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**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA**

State of Arizona, *ex rel.* Kristin K. Mayes,  
Attorney General; et al.,

Plaintiffs,

v.

Michael D. Lansky, L.L.C., dba Avid Telecom;  
et al.,

Defendants.

NO. CV-23-00233-TUC-CKJ

**PLAINTIFFS' RESPONSE IN  
OPPOSITION TO  
DEFENDANTS' MOTION TO  
STAY AND REFER**

Plaintiffs respectfully file this Response in Opposition to Defendants' Michael D. Lansky, L.L.C, dba Avid Telecom ("Avid Telecom"), Michael D. Lansky ("Lansky"), and Stacey S. Reeves ("Reeves") (collectively, "Defendants") Motion to Stay and Refer. [Dkt 30]. For the reasons set forth below, the Court should deny Defendants' Motion to Stay and Refer.

**BACKGROUND**

On May 23, 2023, Plaintiffs filed their complaint against Defendants. [Dkt 1]. On October 6, 2023, Defendants filed a Motion to Stay and Refer, seeking to refer this

case to the Federal Communications Commission (“FCC”) and Federal Trade Commission (“FTC”). [Dkt 30]. This request was “filed as an alternative to the Motion to Dismiss . . . to the extent that the Court declines to dismiss the Complaint in its entirety.” [Dkt 30 at 2 n.1].

There were 136 days between May 23, 2023, and October 6, 2023. During this time, Defendants never communicated with Plaintiffs that this matter should be referred to the FCC or FTC. There is nothing in the record and Defendants do not represent that they have communicated with the FCC or FTC regarding their request that the pending litigation be stayed and referred.

## ARGUMENT

### Legal Standard for Primary Jurisdiction

In general, “[a] federal court's obligation to hear and decide cases within its jurisdiction is virtually unflagging.” *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 126 (2014) (internal quotation omitted). The primary jurisdiction doctrine allows a federal court to abstain from deciding a case within its subject matter jurisdiction if it determines that the “initial decision making responsibility should be performed by the relevant agency rather than the courts.” *Syntek Semiconductor Co. v. Microchip Tech. Inc.*, 307 F.3d 775, 780 (9th Cir. 2002). Such abstention may be appropriate where a claim “implicates technical and policy questions that should be addressed in the first instance by the agency with regulatory authority over the relevant industry.” *Astiana v. Hain Celestial Grp., Inc.*, 783 F.3d 753, 760 (9th Cir. 2015) (citation omitted). Courts should consider “(1) the need to resolve an issue that (2) has been placed by Congress within the jurisdiction of an administrative body having regulatory authority (3) pursuant to a statute that subjects an industry or activity to a comprehensive regulatory authority that (4) requires expertise or uniformity in administration.” *Id.*

Primary jurisdiction “is a doctrine specifically applicable to claims properly cognizable in court that contain some issue within the special competence of an

administrative agency.” *Reiter v. Cooper*, 507 U.S. 258, 268 (1993). It “allows courts to stay proceedings or to dismiss a complaint without prejudice pending the resolution of an issue within the special competence of an administrative agency.” *N. Cnty. Commc'ns Corp. v. Cal. Catalog & Tech.*, 594 F.3d 1149, 1162 (9th Cir. 2010). Primary jurisdiction may be employed when a case “requires resolution of an issue of first impression, or of a particularly complicated issue that Congress has committed to a regulatory agency.” *Syntek Semiconductor Co.*, 307 F.3d at 789. Primary jurisdiction is appropriate where “protection of the integrity of a regulatory scheme dictates preliminary resort to the agency which administers the scheme.” *Id.* (internal quotation omitted).

Primary jurisdiction, however, does not “require that all claims within an agency’s purview . . . be decided by the agency.” *Brown v. MCI WorldCom Network Servs.*, 277 F.3d 1166, 1172 (9th Cir. 2002). It is not used to “secure expert advice” from agencies “every time a court is presented with an issue conceivably within the agency’s ambit.” *Id.*

### **Relevant Rule 12(b)(6) Legal Standard**

When deciding whether to defer jurisdiction at the motion to dismiss stage, the Court should “apply a standard derived from Rule 12(b)(6) jurisprudence: whether the complaint plausibly asserts a claim that would not implicate the [primary jurisdiction] doctrine.” *County of Santa Clara v. Astra United States*, 588 F.3d 1237, 1251–52 (9th Cir. 2009) (declining to invoke primary jurisdiction where action would “plausibly be adjudicated” without agency's expertise), *rev'd on other grounds*, 563 U.S. 110, 131 S.Ct. 1342, 179 L.Ed.2d 457 (2011).

Accordingly, Plaintiffs direct the Court’s attention to the following caselaw regarding Rule 12(b)(6) that may be helpful in deciding whether the doctrine is applicable here.

Ordinarily, a court may look only at the face of the complaint to decide a motion to dismiss. *Van Buskirk v. Cable News Network, Inc.*, 284 F.3d 977, 980 (9th Cir. 2002).

1 When considering a Rule 12(b)(6) motion to dismiss, the Court should take all material  
2 allegations as true and construe the claims in the light most favorable to the plaintiffs. *NL*  
3 *Indus., Inc. v. Kaplan*, 792 F.2d 896, 898 (9th Cir. 1986). “A complaint should not be  
4 dismissed unless it appears beyond doubt that plaintiff can prove no set of facts in support  
5 of his claim which would entitle him to relief.” *Rabang v. INS*, 35 F.3d 1449, 1451 (9th  
6 Cir.1994) (citing *Buckey v. County of Los Angeles*, 968 F.2d 791, 793–94 (9th Cir. 1992)).

7 “Threadbare recitals of the elements of a cause of action, supported by mere  
8 conclusory statements, do not suffice.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)  
9 (citation omitted). “While legal conclusions can provide the framework of a complaint,  
10 they must be supported by factual allegations.” *Id.* at 679. Thus, the Court may begin “by  
11 identifying pleadings that, because they are no more than conclusions, are not entitled to  
12 the assumption of truth.” *See id.* Courts then should determine whether the factual  
13 allegations in the complaint “plausibly give rise to an entitlement to relief.” *Id.* While the  
14 plausibility inquiry “is not akin to a probability requirement,” a complaint will not survive  
15 a motion to dismiss if the factual allegations “do not permit the court to infer more than the  
16 mere possibility of misconduct[.]” *Id.* at 678–79 (internal quotation marks omitted). The  
17 complaint must “nudge[ ] the[ ] claims across the line from conceivable to plausible[.]”  
18 *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

19 “Generally, a district court may not consider any material beyond the pleadings in  
20 ruling on a Rule 12(b)(6) motion. . . . However, material which is properly submitted as  
21 part of the complaint may be considered” with a motion to dismiss. *Hal Roach Studios,*  
22 *Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1555 n.19 (9th Cir. 1990) (citations omitted).  
23 “Documents whose contents are alleged in a complaint and whose authenticity no party  
24 questions, but which are not physically attached to the pleading, may be considered in  
25 ruling on a Rule 12(b)(6) motion to dismiss” without converting the motion into a motion  
26 for summary judgment. *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994). Under Federal  
27 Rule of Evidence 201, the court may also take judicial notice of “matters of public  
28

record[,]” without converting the motion to dismiss into a motion for summary judgment.  
*Mack v. S. Bay Beer Distrib.*, 798 F.2d 1279, 1282 (9th Cir. 1986).

Since the standard used to analyze the Motion to Stay and Refer is derived from Rule 12(b)(6) in the Ninth Circuit, Local Rule 12.1(c) should apply to Defendants’ Motion to Stay and Refer. If the Court agrees, then Local Rule 12.1(c) provides that a Federal Rule of Civil Procedure 12(b)(6) motion will not be considered unless “the moving party includes a certification that, before filing the motion, the movant notified the opposing party of the issues asserted in the motion and the parties were unable to agree that the pleading was curable in any part by a permissible amendment offered by the pleading party.” LRCiv 12.1(c). Here, Defendants do not claim that they met and conferred with Plaintiffs about either about the claims and defenses advanced in their Motion to Stay and Refer or the claims and defenses brought forward in Defendants’ Motion to Dismiss, and did not in fact do so. [Dkt 39]. As such, the Court can and should dismiss the Motion to Stay and Refer for Defendants’ failure to comply with Local Rule 12.1(c).

### **Plaintiffs Have Legal Authority to Bring an Action Against Defendants**

The Court should deny Defendants’ Motion to Stay and Refer because Plaintiffs have legal authority to bring these actions against Defendants. Further, Defendants do not argue or dispute that Plaintiffs have the authority to bring the federal claims at issue in the Complaint or that Plaintiffs have given proper notice to the FTC or FCC as required.

Plaintiffs are authorized to enforce the Telemarketing and Consumer Fraud and Abuse Prevention Act (“Telemarketing Act”) and the TSR. 15 U.S.C. §§ 6103(a) and (f)(2). Plaintiffs notified the FTC of the civil action, as required by 15 U.S.C. § 6103(b) and 16 C.F.R. § 310.7(a). Complaint ¶ 4, [Dkt 1].

Plaintiffs are likewise authorized to enforce the TCPA and its regulations. 47 U.S.C. § 227(g)(1). Further, Plaintiffs are authorized to enforce the Truth and Caller ID Act and its regulations. 47 U.S.C. § 227(e)(6)(A). Plaintiffs notified the FCC of this civil action, as required by 47 U.S.C. §§ 227(e)(6)(B) and (g)(3). Complaint ¶ 5, [Dkt 1].

**Plaintiffs’ Claims Do Not Implicate the Primary Jurisdiction Doctrine.**

Defendants’ main contention as to why this case should be stayed and referred is based solely on Defendants’ assertions about the purported “open issues” concerning the definition of “consent” under the TCPA and TSR. [Dkt 30 at 6, 8, 9, 10]. Defendants fail to present any additional substantive arguments in support of their contention that this case should be stayed and referred to the FCC and FTC. Defendants misstate the nature of this case in their argument that “every call that the Plaintiffs allege to be illegal would undeniably be legal if it was associated with a proper [consent] opt-in.” [Dkt 30 at 7]. Defendants’ assertion fails to account for Plaintiffs’ claims that do not relate to the issue of consent. Where consent is relevant to Plaintiffs’ claims, it can be raised only as an affirmative defense.

Here, Plaintiffs allege that Defendants and their customers made or initiated prerecorded calls and/or calls to telephone numbers on the National DNC Registry without requisite consent from the called party. *See* Complaint at ¶¶ 29, 33(e), 33(f), 214, 278, 312, 388, 395, 442-44, and 460(c). Further, Plaintiffs allege that Defendants and their customers made prerecorded calls where the purported consent did not relate to the same subject or type of transaction. *See* Complaint at ¶¶ 126, 131-74, and 301.

In the Ninth Circuit, consent in the telemarketing space is not a matter of first impression, and it is not a particularly complicated legal issue requiring the FTC’s or FCC’s expertise.

Under the TCPA, “[p]rior express consent is a complete defense to ... [a] TCPA claim.” *Van Patten v. Vertical Fitness Grp., LLC*, 847 F.3d 1037, 1044 (9th Cir. 2017). Because prior express consent “is not an element of a plaintiff’s prima facie case but is an affirmative defense,” a defendant bears the burden of proof. *Id.*

Consent exists where a person “knowingly releases” his or her telephone number, and it is “‘effective’ whe[n] the responsive messages relate to the same subject or type of transaction” which initially prompted the person to share his or her telephone number. *See Moskowitz v. Am. Sav. Bank, F.S.B.*, 37 F.4th 538, 541 (9th Cir. 2022)

(citing *Van Patten*, 847 F.3d at 1044-45; *In re Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991*, 7 F.C.C. Rcd. 8752, 8769 (Oct. 16, 1992)).

In cases where an individual alleges a defendant violated the TCPA, it is sufficient at the pleading stage to allege he or she did not consent and for there to be a lack of contradictory allegations in the complaint. *See Whittaker v. Freeway Ins. Servs. Am., LLC*, No. CV-22-8042-PCT-DGC, 2023 WL 167040, at \*4 (D. Ariz. Jan. 12, 2023); *Whittaker v. Real Est. Heaven Int'l Inc.*, No. CV-21-08212-PCT-DJH, 2022 WL 1540168, at \*3 (D. Ariz. May 16, 2022). Plaintiffs have more than satisfied this requirement.

To the extent that purported consent was obtained from called parties via websites, the Ninth Circuit provides a two-part test for determining whether terms and conditions presented on websites provide “reasonably conspicuous notice” as to bind its users to terms of the agreements. *Berman v. Freedom Fin. Network, LLC*. 30 F.4<sup>th</sup> 849, 853 (9th Cir. 2022).

With respect to the TSR, Defendants do not offer any argument as to why the Court must adopt a standard other than that which is already propounded by the Ninth Circuit. “In 2008, the FTC amended the [TSR] to prohibit unsolicited robocalling in the form of ‘any outbound telephone call that delivers a prerecorded message’ by telemarketers without prior consent from the consumer.” *Unified Data Servs., LLC v. Fed. Trade Comm’n*, 39 F.4th 1200, 1204 (9th Cir. 2022) (citing 16 C.F.R. § 310.4(b)(1)(v)). This is still the applicable standard and the Rule.

Defendants claim that in July of 2023 the FTC “abruptly and without prior notice, changed its interpretation of TSR rules concerning the manner in which a telemarketer can secure the lawful consent of a party to receive telemarketing calls[,]” and that suddenly “after years of enforcement” the FTC changed its position to now requiring that “consent can only be obtained directly from a consumer and cannot be transferred.” [Dkt at 10]. This characterization is patently false. In August of **2008**, the FTC published notice of this

1 requirement in the Federal Register. In response to an inquiry as to whether sellers would  
2 be required to disclose whether they will sell consumers' contact information or share it  
3 with affiliates or other companies, the FTC stated:

4  
5 In this regard, the Commission emphasizes that a consumer's  
6 agreement with *a* seller to receive calls delivering prerecorded  
7 messages is *nontransferable*. Any party other than *that particular*  
8 *seller must negotiate its own agreement with the consumer to accept*  
9 *calls delivering prerecorded messages*. Prerecorded calls placed to a  
10 consumer on the National Do Not Call Registry by some third party  
11 that does not have its own agreement with the consumer would violate  
12 the TSR. Thus, because information sharing cannot be a shortcut for  
13 the required written agreement to receive prerecorded calls, the  
14 Commission sees no need to impose a disclosure about information  
15 sharing.<sup>1</sup> (Emphases added.)

16 With respect to the TCPA, a Ninth Circuit district court analyzed the TCPA's  
17 established business relationship ("EBR") defense similarly to its analysis of consent  
18 under the TSR, noting that "Congress directed the FCC to 'consult and coordinate with  
19 the [FTC]' to 'maximize consistency' between the do-not-call rules in the TCPA and  
20 the TSR." *Trim v. Mayvenn, Inc.*, No. 20-CV-03917-MMC, 2022 WL 1016663, at \*4  
21 (N.D. Cal. Apr. 5, 2022) (citing 15 U.S.C. § 6153). The court expressly provided that  
22 "the TCPA's EBR exemption should be construed in a manner that 'maximize[s]  
23 consistency' with the identical exemption provided for in the TSR." *Id.*

24 Here, Defendants have failed to show that consent, whether under the TCPA or  
25 the TSR, is a matter of first impression, or that it is a particularly complicated issue.  
26 *See Syntek Semiconductor Co.*, 307 F.3d at 789. Thus, Defendants have failed to show  
27 there is a need to invoke the primary jurisdiction doctrine, since this matter can be  
28 adjudicated without an agency's expertise based on cogent Ninth Circuit precedent.

For these reasons, the Court should deny Defendants' Motion for Stay and  
Refer.

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<sup>1</sup> See Federal Register, Vol. 73, No. 169, August 29, 2008, 2008 WL 3982667, 73 FR 51164-01 at 51182 (emphasis added).

**Defendants Fail to Show the *Astiana* Factors Weigh in Favor of Invoking the  
Primary Jurisdiction Doctrine**

Defendants are unable to show that the *Astiana* factors weigh in favor of invoking primary jurisdiction. The *Astiana* factors are: “(1) the need to resolve an issue that (2) has been placed by Congress within the jurisdiction of an administrative body having regulatory authority (3) pursuant to a statute that subjects an industry or activity to a comprehensive regulatory authority that (4) requires expertise or uniformity in administration.” *Astiana*, 783 F.3d at 760 (citation omitted).

Defendants’ challenge fails to establish the first *Astiana* factor. Courts have been determining legality of telephone calls under the TCPA and the TSR for decades without the FCC and the FTC weighing in on each case. The TCPA includes a private right of action by which scores of private citizens have recovered statutory damages for calls received without requisite consent. *See* 47 U.S.C. § 227(b)(3). Additionally, state attorneys general regularly file actions in courts across the country to enforce the TSR and the TCPA. As stated above, the Ninth Circuit has already provided clear guidance on the issue of consent, which is the only issue substantively challenged by Defendants in this Motion. *Moskowitz*, 37 F.4th at 541. Additionally, since it is not Plaintiffs’ burden to prove a lack of consent, especially at the pleading stage, Defendants have failed to establish this factor. *See Van Patten*, 847 F.3d at 1044.

As to the second *Astiana* factor, FCC and the FTC have rulemaking authority over the TCPA and TSR. However, that fact alone does not deprive Plaintiffs of the right to enforce the rules currently in effect. Defendants’ vague references to “the everchanging landscapes of federal regulation of robocalling services” is insufficient legal grounds to stay and refer the case. [Dkt 30 at 6]. Similarly, Defendants’ reliance on the FTC’s April 2022 Notice of Proposed Rulemaking is unavailing because the Plaintiffs do not allege any violations related to business-to-business calls, nor can they allege violations of rules that don’t yet exist. [Dkt 30 at 10]. Plaintiffs are authorized to bring claims under the TCPA and the TSR after providing each respective agency with

1 written notice of their action prior to initiating the same. *See* 47 U.S.C. § 227(g)(1);  
 2 47 U.S.C. § 227(e)(6)(A); 15 U.S.C. §§ 6103(a) and (f)(2); 16 C.F.R. § 310.7(a). Here,  
 3 Plaintiffs notified the FCC and FTC about this action before initiating it. Complaint at  
 4 ¶¶ 4, 5. Defendants do not—and cannot—challenge Plaintiffs’ authority to bring claims  
 5 under the TCPA and TSR, nor do Defendants assert that Plaintiffs failed to comply with  
 6 the notification requirements under each. Simply put, Defendants cite no authority that  
 7 would prevent Plaintiffs from enforcing rules that are currently in effect.

8 The FCC has the right to intervene in this litigation. *See* 47 U.S.C. § 227(g)(3).  
 9 The FCC has not done so. Defendants’ Motion fails to mention that the FCC has already  
 10 raised concerns similar to those addressed in Plaintiffs’ Complaint with Defendant  
 11 Avid Telecom’s business practices by issuing a cease-and-desist letter to Defendant  
 12 Avid Telecom. *See FCC Looks to Cut Off Insurance-Related Robocall Campaign: Avid*  
 13 *Telecom Originated Robocalls Allegedly Made Without Consumer Consent & Must Cease-*  
 14 *and-Desist Originating Robocalls or Face Getting Cut Off*, FCC (Jun. 7, 2023)<sup>2</sup>, (“The  
 15 FCC and its partners believe these robocalls were made without consumer consent. This  
 16 investigation builds off of the work of state Attorneys General who recently filed a lawsuit  
 17 against Avid Telecom.”).

18 In that cease-and-desist letter, the FCC stated: “Avid’s customer failed to make  
 19 adequate disclosures to obtain consent “that authorizes the caller to deliver advertisements  
 20 or telemarketing messages using an auto-dialer or an artificial or prerecorded voice,” or  
 21 “disregarded when a consumer revoked such alleged prior consent.” *Id.* at 2. The FCC  
 22 further stated that, “[f]or a separate call, where a consumer explicitly revoked any alleged  
 23 consent, Avid provided no defense for the subsequent unconsented-to call.” *Id.* at 3.

24 Similarly, the FTC has the right to intervene at any point in this litigation. 15 U.S.C.  
 25 § 6103(b). The FTC has not elected to do so. Plaintiffs’ Count I of the Complaint is  
 26 consistent with the FTC’s long history of bringing enforcement actions under the TSR  
 27 against individuals and entities that provide substantial assistance or support to seller or  
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<sup>2</sup> <https://www.fcc.gov/document/fcc-looks-cut-insurance-related-robocall-campaign>

1 telemarketers while knowing, or consciously avoiding knowing, that the sellers or  
 2 telemarketers are violating the TSR. Specifically, the FTC has taken many actions against  
 3 VoIP services and others providing access to telephone numbers for Caller ID management  
 4 and dialer resources, similar to services Defendant Avid Telecom provided its customers.  
 5 *See United States of America v. Roy M. Cox, Jr., No. 8:11-cv-0058 (C.D. Cal.)*<sup>3</sup>; *FTC, et*  
 6 *al. Caribbean Cruise Line, Inc., et al., No. 0:15-cv-60423 (S.D. Fla.)*<sup>4</sup>; *FTC v. Aaron*  
 7 *Michael Jones, et al., 8:17-cv-00058 (S.C. Cal.)*<sup>5</sup>; *FTC v. James Christiano, et al., No.*  
 8 *8:18-cv-00936 (C.D. Cal.)*<sup>6</sup>; *FTC v. Derek Jason Bartoli, No. 6:19-cv-01160 (M.D. Fla.)*<sup>7</sup>;  
 9 *FTC, et al., v. Educare Centre Services, Inc., et al., No. 3:19-cv-00196 (W.D. Tex.)*<sup>8</sup>;  
 10 *Alcazar Networks Inc., et al., No. 6:20-cv-02200 (M.D. Fla.)*<sup>9</sup>; *United States of America v.*  
 11 *VOIP Terminator, Inc., et al., 6:22-cv-00798 (M.D. Fla.)*<sup>10</sup>; *United States of America v.*  
 12 *Stratics Network, Inc., et al (S.D. Cal.)*<sup>11</sup> *United States of America v. XCast Labs, Inc., No.*  
 13 *2:23-cv-03646 (C.D. Cal.)*<sup>12</sup>. A number of state attorneys general have also pursued similar  
 14 TSR actions. *See State of Florida v. Smartbiz Telecom LLC, No. 1:22-cv-23945 (S.D.*  
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17 <sup>3</sup> [https://www.ftc.gov/legal-library/browse/cases-proceedings/092-3193-castle-rock-](https://www.ftc.gov/legal-library/browse/cases-proceedings/092-3193-castle-rock-capital-management-inc)  
 18 [capital-management-inc](https://www.ftc.gov/legal-library/browse/cases-proceedings/092-3193-castle-rock-capital-management-inc)

19 <sup>4</sup> [https://www.ftc.gov/legal-library/browse/cases-proceedings/122-3196-x150028-](https://www.ftc.gov/legal-library/browse/cases-proceedings/122-3196-x150028-caribbean-cruise-line-inc)  
 20 [caribbean-cruise-line-inc](https://www.ftc.gov/legal-library/browse/cases-proceedings/122-3196-x150028-caribbean-cruise-line-inc)

21 <sup>5</sup> [https://www.ftc.gov/legal-library/browse/cases-proceedings/152-3152-x170013-aaron-](https://www.ftc.gov/legal-library/browse/cases-proceedings/152-3152-x170013-aaron-michael-jones)  
 22 [michael-jones](https://www.ftc.gov/legal-library/browse/cases-proceedings/152-3152-x170013-aaron-michael-jones)

23 <sup>6</sup> [https://www.ftc.gov/legal-library/browse/cases-proceedings/162-3124-x180032-james-](https://www.ftc.gov/legal-library/browse/cases-proceedings/162-3124-x180032-james-christiano-et-al-netdotsolutions-inc)  
 24 [christiano-et-al-netdotsolutions-inc](https://www.ftc.gov/legal-library/browse/cases-proceedings/162-3124-x180032-james-christiano-et-al-netdotsolutions-inc)

25 <sup>7</sup> [https://www.ftc.gov/legal-library/browse/cases-proceedings/182-3105-derek-jason-](https://www.ftc.gov/legal-library/browse/cases-proceedings/182-3105-derek-jason-bartoli)  
 26 [bartoli](https://www.ftc.gov/legal-library/browse/cases-proceedings/182-3105-derek-jason-bartoli)

27 <sup>8</sup> [https://www.ftc.gov/legal-library/browse/cases-proceedings/192-3033-educare-centre-](https://www.ftc.gov/legal-library/browse/cases-proceedings/192-3033-educare-centre-services-inc)  
 28 [services-inc](https://www.ftc.gov/legal-library/browse/cases-proceedings/192-3033-educare-centre-services-inc)

<sup>9</sup> [https://www.ftc.gov/legal-library/browse/cases-proceedings/1923259-alcazar-networks-](https://www.ftc.gov/legal-library/browse/cases-proceedings/1923259-alcazar-networks-inc)  
[inc](https://www.ftc.gov/legal-library/browse/cases-proceedings/1923259-alcazar-networks-inc)

<sup>10</sup> [https://www.ftc.gov/legal-library/browse/cases-proceedings/1923189-voip-terminator-](https://www.ftc.gov/legal-library/browse/cases-proceedings/1923189-voip-terminator-inc-us-v)  
[inc-us-v](https://www.ftc.gov/legal-library/browse/cases-proceedings/1923189-voip-terminator-inc-us-v)

<sup>11</sup> <https://www.ftc.gov/legal-library/browse/cases-proceedings/2023189-stratics-networks>

<sup>12</sup> [https://www.ftc.gov/legal-library/browse/cases-proceedings/222-3097-xcast-labs-inc-](https://www.ftc.gov/legal-library/browse/cases-proceedings/222-3097-xcast-labs-inc-us-v)  
[us-v](https://www.ftc.gov/legal-library/browse/cases-proceedings/222-3097-xcast-labs-inc-us-v)

1 Fla.)<sup>13</sup>, *State of North Carolina v. Articul8 LLC, et al.*, No. 1:22-cv-00058 (M.D.N.C.)<sup>14</sup>,  
 2 *State of Indiana v Startel Communications LLC, et al.*, No. 3:21-cv-00150 (S.D. Ind.); *State*  
 3 *of Vermont v. Dominic Bohnett, et al.* No. 5:22-cv-00069 (D. Vt.)<sup>15</sup>, *State of Texas, et al.,*  
 4 *v Rising Eagle Capital Group, LLC, et al.*, No. 4:20-cv-02021 (S.D. Tex.). Additionally,  
 5 at least one private class has been filed against VoIP service providers alleging violations  
 6 of the TCPA for the providers role in transmitting robocalls without consent of the call  
 7 recipients. *See Mey v. All Access Telecom, Inc., et al.*, No. 5:19-cv-00237 (N.D. W.Va.).

8 With respect to the third *Astiana* factor, while the TCPA and TSR apply to most  
 9 individuals and entities,<sup>16</sup> Defendants’ only substantive argument is that *the definition of*  
 10 *consent* is complex. As addressed previously, this issue is not complex. In the Ninth  
 11 Circuit, consent exists where a person “knowingly releases” his or her telephone number,  
 12 and it is “‘effective’ whe[n] the responsive messages relate to the same subject or type of  
 13 transaction” which initially prompted the person to share his or her telephone number. *See*  
 14 *Moskowitz*, 37 F.4th at 541.

15 Finally, Defendants argument fails to establish the fourth *Astiana* factor.  
 16 No expertise is needed with respect to the sole substantive argument brought forward by  
 17 Defendants, as the Ninth Circuit has provided clear guidance that consent exists where a  
 18 person “knowingly releases” his or her telephone number, and it is “‘effective’ whe[n] the  
 19 responsive messages relate to the same subject or type of transaction” that initially  
 20 prompted the person to share his or her telephone number. *Moskowitz*, 37 F.4th at 541.

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23 <sup>13</sup>  
 24 [https://www.myfloridalegal.com/files/pdf/page/DE8589ADA8B9DB738525890F0055D5](https://www.myfloridalegal.com/files/pdf/page/DE8589ADA8B9DB738525890F0055D5DA/Web+Link.pdf)  
 25 [DA/Web+Link.pdf](https://www.myfloridalegal.com/files/pdf/page/DE8589ADA8B9DB738525890F0055D5DA/Web+Link.pdf)

26 <sup>14</sup> [https://ncdoj.gov/wp-content/uploads/2022/01/FILED-Complaint\\_NC-v-Articul8\\_22-](https://ncdoj.gov/wp-content/uploads/2022/01/FILED-Complaint_NC-v-Articul8_22-cv-00058-MDNC-2022.pdf)  
 27 [cv-00058-MDNC-2022.pdf](https://ncdoj.gov/wp-content/uploads/2022/01/FILED-Complaint_NC-v-Articul8_22-cv-00058-MDNC-2022.pdf)

28 <sup>15</sup> [https://ago.vermont.gov/sites/ago/files/wp-content/uploads/2022/03/TCA-VOIP-](https://ago.vermont.gov/sites/ago/files/wp-content/uploads/2022/03/TCA-VOIP-Complaint.pdf)  
[Complaint.pdf](https://ago.vermont.gov/sites/ago/files/wp-content/uploads/2022/03/TCA-VOIP-Complaint.pdf)

<sup>16</sup> Plaintiffs note that Defendants argued in their Motion to Dismiss that Defendant Michael D. Lansky, LLC, dba Avid Telecom is a common carrier and that the TSR is not applicable to it. [Dkt 39 at 16].

1 Defendants fail to show why the FCC or FTC’s expertise is needed here, especially in the  
2 face of clear guidance from the Ninth Circuit.

3 Defendants are unable to show why this case, unlike others that have preceded it,  
4 should be stayed and referred under the *Astiana* standard. *See Astiana.*, 783 F.3d at 760.  
5 As such, the Court should deny Defendants’ Motion.

### 6 **Defendants’ Remaining Assertions**

7 Defendants have made several unsupported or otherwise incomplete assertions  
8 throughout their Motion. First, Defendants did not state whether they contacted the FCC  
9 and FTC about this case generally or about their concerns about the purported ambiguities  
10 in the definition of consent. Next, Defendants, do not direct this Court’s attention to  
11 authority as to how this matter would be “referred” to the FCC and FTC. Nor have  
12 Defendants clarified what this Court should specifically ask the FCC and FTC to do.  
13 Ultimately, Defendants’ Motion provides neither the justification nor the mechanism for  
14 their request.

15 Again, as discussed above, Defendants’ primary substantive argument is that  
16 several Plaintiff States “do not understand” what consent is. [Dkt at 7]. In addition to  
17 absolutely mischaracterizing these Plaintiff States’ position, Defendants fail to include  
18 the actual Reply Comment from these Plaintiff States. To the extent that this Court  
19 deems it appropriate to examine information outside the pleadings in order to consider this  
20 Motion to Stay and Refer, Plaintiffs have attached<sup>17</sup> a copy of the Reply Comment in  
21 which they address the meaning of consent, as Exhibit 1.

22 In short, Defendants’ mischaracterization of the Reply Comment is the primary  
23 basis of their argument as to why Counts II, III, IV, and V should be stayed and referred  
24 in their entirety to the FCC. However, Defendants do not advance arguments why the  
25 Court should stay most of Count I, Count II, and Count V to the extent that those counts  
26 do not pertain to consent.

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27  
28 <sup>17</sup> Plaintiffs respectfully request that the Court take Judicial Notice that this was the  
Reply Comment filed by 28 of Plaintiff States.

For Count I, Plaintiffs alleged violations of the TSR that have no affirmative defense of consent: (Complaint at ¶ 431)

- Misrepresented material aspects of goods or services, in violation of 16 C.F.R. § 310.3(a)(2)(iii); (*Id.* at ¶ 431(a)).
- Misrepresented the seller's or telemarketer's affiliation with corporations or government entities, in violation of 16 C.F.R. § 310.3(a)(2)(vii); (*Id.* at ¶ 431(b)).
- Made false or misleading statements to induce any person to pay for goods or services, in violation of 16 C.F.R. § 310.3(a)(4); (*Id.* at ¶ 431(c)).
- Failed to transmit or cause to be transmitted the real telephone number and the name of the telemarketer to caller identification services used by call recipients in violation of 16 C.F.R. § 310.4(a)(8); (*Id.* at ¶ 431(d)).
- Initiated or caused the initiation of outbound calls to telephone calls that delivered prerecorded messages, in violation of 16 C.F.R. § 310.4(b)(1)(v);<sup>18</sup> (*Id.* at ¶ 431(f)).
- Failed to disclose the identity of the seller of the goods or services truthfully, promptly, and in a clear and conspicuous manner to the person receiving the call, in violation of 16 C.F.R. § 310.4(d)(1). (*Id.* at ¶ 431(g)).

Defendants do not provide any argument as to why these allegations should be stayed and referred to the FTC. In fact, the Defendants' Motion includes copies of traceback notices received by Defendants as Exhibit 1, many of which support the Plaintiffs' claims in Count 1 that calls failed to disclose the identity of the caller and to provide opt-out disclosures. [Dkt. 30-1].

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<sup>18</sup> In addition to other requirements, 16 C.F.R. § 310.4(b)(1)(v) requires prerecorded calls to provide opt-out mechanisms.

1 Likewise, Defendants do not provide any argument why Count II of the Complaint  
2 (Failure to Exercise Due Diligence/ KYC) should be stayed and referred to the FCC. Count  
3 II does not include consent as an affirmative defense. Defendants do not provide any  
4 argument why Count V of the Complaint (violations of the Truth in Caller ID Act) should  
5 be stayed and referred to the FCC. Count V does not include consent as an affirmative  
6 defense.

7 Finally, Defendants do not provide any argument why the alleged violations of  
8 Count I, III, and IV should be stayed as to calls that are scams or clearly fraudulent. Under  
9 any definition of consent, residents of Plaintiffs' States are unable to consent to scam or  
10 fraudulent calls.

11 For these Counts, the Court should not stay and refer to the FCC or the FTC.

12 Next, in Footnote 6, Defendants assert that some of Plaintiffs' alleged evidence  
13 was not legally obtained. It is unclear on how, if at all, these baseless and unsupported  
14 assertions advance any argument in support of Defendants' Motion to Stay and Refer  
15 beyond being merely heavy-handed tactics and attempts at intimidation of Plaintiffs  
16 and potential witnesses and experts in this matter. Defendants suggest in this footnote  
17 that they should be entitled to some type of "targeted discovery" as a result of these  
18 unsupported accusations without providing any basis in law about how and why  
19 Defendants would be entitled to discovery on a motion to stay and refer. If this is truly  
20 Defendants' position, then Defendants should answer the Complaint, and the parties  
21 should move to the discovery portion of the case. Otherwise, the unsupported and  
22 meritless assertions in Footnote 6 should be disregarded by the Court.

### 23 CONCLUSION

24 For the reasons articulated above, Plaintiffs respectfully request that the Court  
25 deny Defendants' Motion to Stay and Refer. In the alternative, if the Court is inclined to  
26 grant any portion of Defendants' Motion, the Court should refer only the pertinent claims  
27 of Plaintiffs' Counts in the Complaint where consent is a defense.

28 RESPECTFULLY SUBMITTED DATED this 6th day of November, 2023.

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**CERTIFICATE OF SERVICE**

I hereby certify that on November 6, 2023, I caused the foregoing, PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO STAY AND REFER, to be filed and served electronically via the Court's CM/ECF system upon counsel of record.

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